Appendix A

UNITED STATES, *Appellee*,

v.

James M. ALLEN, First Lieutenant,
U.S. Air Force, *Appellant*.

No. 99-0788

Crim. App. No. 32727

United States Court of Appeals for the Armed Forces

Argued May 4, 2000
Decided August 30, 2000

COX, S.M., delivered the opinion of the Court, in which CRAWFORD, C.J., GIERKE and EFFRON, JJ., joined. SULLIVAN, J., filed an opinion concurring in the result.

Counsel

For Appellant: Captain Karen L. Hecker, USAF (argued); Colonel Jeanne M. Rueth and Alison Ruttenberg (on brief).
For Appellee: Major Harold M. Vaught, USAF (argued); Colonel Anthony P. Dattilo, Lieutenant Colonel Ronald A. Rodgers, and Major Jennifer R. Rider USAF (on brief).

Military Judge: Donald E. Walsh

Senior Judge COX delivered the opinion of the Court.

Contrary to his pleas, appellant was convicted by officer members of anal sodomy, assault consummated by a battery, two specifications of conduct unbecoming an officer, transporting and receiving child pornography in interstate commerce, and soliciting his wife to commit prostitution, in violation of Articles 125, 128, 133, and 134, Uniform Code of Military Justice, 10 USC §§ 925, 928, 933, and 934, respectively.

The convening authority approved the sentence of a dismissal, 7 years' confinement, and total forfeitures. The Air Force Court of Criminal Appeals affirmed the findings and sentence. We granted review of the following issues:

> I. WHETHER THE MILITARY JUDGE COMMITTED PREJUDICIAL ERROR IN DENYING THE DEFENSE MOTION TO SUPPRESS.
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> II. WHETHER APPELLANT'S CONVICTION FOR SODOMY, A PRIVATE CONSENSUAL ACT BETWEEN APPELLANT AND HIS WIFE, MUST BE SET ASIDE AND DISMISSED SINCE IT IS A VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO PRIVACY.

FACTS

1. Issue I

On July 31, 1996, a government network technician became concerned that files passing through the network firewall onto a government computer might contain attached graphic images of pornography. When the technician examined a portion of one image, he concluded it involved child pornography. He reported the incident to his supervisor who in turn reported it to the Air Force Office of Special Investigations (AFOSI or OSI). The internet service provider was "Super Zippo."

The OSI investigation revealed that the computer to which the graphic image was being sent was located in an area in which four people worked, although the area was accessible to others. The investigation excluded three of the four people working in the area as capable of having received the graphic image, largely because those three persons were not present in the area at the time. The remaining individual, appellant, admitted he had been using the computer in question for a

period of about 15 to 20 minutes that day. He also admitted that "Super Zippo" was his Internet Access Provider (IAP),[1] and that he possessed "erotica" at home. When asked if this included child pornography, appellant stammered, then asked what the agents meant by child.

Because appellant's private residence was off-post, OSI agents went to El Paso County law enforcement to have them obtain a search warrant. The El Paso County officer prepared an affidavit, went to a civilian judge, and obtained a state search warrant to search appellant's home for child pornography, for documents pertaining to appellant's "Super Zippo" account, and to identify persons controlling the premises. OSI agents accompanied the El Paso County officer to appellant's home. Numerous photos, computers, and computer discs were seized pursuant to the warrant.

The warrant in the case sub judice authorized only a search of appellant's residence. The information concerning appellant's IAP account was obtained by an OSI agent, through a telephone conversation with the manager of "Super Zippo," appellant's IAP provider. Although the OSI agent did not possess a warrant when he requested appellant's account information from "Super Zippo," he "specifically asked whether a search warrant or a subpoena [was] required." After consulting with corporate counsel, the manager of "Super Zippo" called the agent and indicated that based upon advice from counsel, all that would be needed to release the records was a "lawyer request." The agent testified that he relied on the manager's assertion that no warrant was required.

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[1] "There are two types of IAPs: (1) Online Service Providers ('OSLs')(e.g., America Online, Prodigy, CompuServe, Microsoft Network) offer a full range of online services in addition to Web access, including e-mail, news, entertainment, and places to 'meet' people with similar interests; and (2) Internet Service Providers ('ISPs') (e.g., At&T Worldnet, Mindspring, Netcom) offer a cheaper, more 'bare bones' package, including e-mail, Web access, and basic software." U.S. v. Microsoft Corp., 1998 WL 614485 at **5-6 (D.D.C. Sept. 14, 1998).

The OSI agent testified that he requested information pertaining to appellant's online account and "any records of access to the online service that would indicate different areas that [appellant] traveled to." The information received was a multiple page listing of online services accessed by appellant through his "Super Zippo" account, and did not contain the text of or reveal the content of any communications received or sent.

Appellant makes a multi-faceted attack upon the conduct of law enforcement officials and the search warrant. Those contentions are:

1. The search warrant violated Federal Rule of Criminal Procedure (FRCP) 41, and Air Force Office of Special Investigation (AFOSI) regulations.

2. The search warrant violated the Posse Comitatus Act.

3. The search warrant was a general warrant and not based upon probable cause.

4. The search warrant was obtained as a result of false statements to the state court magistrate judge.

5. The warrantless search of appellant's internet account with "Super Zippo" violated the Fourth Amendment and the Electronic Communications Privacy Act.

After hearing evidence on a motion to suppress the evidence seized from appellant's home and from "Super Zippo," the military judge denied the motion. He ruled that: (1) the affidavit was not knowingly and intentionally false or made with reckless disregard for the truth; (2) there was probable cause to issue the warrant; (3) the search warrant was not overbroad or too general; (4) the search did not exceed the scope of the search warrant; (5) there was no expectation of privacy in the type of information provided by "Super Zippo" and it would have been inevitably discovered; (6) the "Super Zippo" information was not "fruit of the poisonous tree"; and

(7) violations of Air Force Regulations concerning coordination with a United States Attorney were not "fatal to this particular search." The military judge also attached written findings to the record.

2. Issue II

The second issue asks us to consider whether anal intercourse between a husband and a wife is constitutionally protected conduct. The facts, as described by two judges of the court below who formed a majority on this issue, are as follows:

> The appellant was convicted of assaulting his former wife by grabbing her throat, choking her, and banging her head on the floor. He was also convicted of soliciting her to commit prostitution. According to the appellant's former wife, he told her to prostitute herself because they could use the money she received to pay family bills and that having sex with other men would improve their sexual relationship. She testified that during their marriage prior to the assaults and the prostitution, she refused appellant's requests to engage in this sexual act because she had been forcibly and painfully sodomized while a teenager. Her revulsion and fear of this sexual act was underscored by her testimony that she refused to allow any of the men who paid to have sex with her to perform this sexual act on her. Obviously, after being assaulted and encouraged to have sex with other men by her husband, she had less bargaining power with him than she had with total strangers. Due to the pain she experienced whenever the appellant performed this sexual act, on one occasion she did allow him to videotape in exchange for his promise to stop subjecting her to this violation. Unfortunately, the appellant did not honor his promise.

Unpub. op. at 19.

DISCUSSION

A. Standard of Review

Issues involving the admissibility of evidence are reviewed for an abuse of discretion. United States v. Johnson, 46 MJ 8, 10 (1997). Findings of fact will not be overturned unless they are clearly erroneous or unsupported by the record of trial. United States v. Richter, 51 MJ 213, 220 (1999). Conclusions of law will be reviewed de novo, and will not be overturned unless the decision was based upon an erroneous view of the law. Id.

B. Issue I

1. Whether the search warrant violates 28 CFR § 60.1, as applied to the AFOSI by paragraph 6(c) of AFOSI Regulation 124-82.[2]

Appellant relies upon these provisions to support a claim that the search was unlawful. Specifically, appellant assails OSI's failure to obtain the concurrence of a United States Attorney before obtaining the warrant at issue.

First, these provisions do not confer a protection upon appellant enforceable by virtue of the exclusionary rule. Appellant's reasonable expectation of privacy yields, not to coordination between police and prosecutors, but to compliance with the warrant requirement of the Fourth Amendment. The failure to coordinate with a United States Attorney prior to obtaining a warrant issued by a competent Colorado state judge is not unreasonable conduct by law enforcement which serves to violate any of appellant's Fourth Amendment protections. See United States v. Guzman, 52 MJ 318, 321 (2000)(Like the Supreme Court in United States v. Caceres, 440 U.S. 741 (1979), this Court refused to apply the exclusionary rule to a violation of a Department of Defense or

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[2] These provisions authorize federal law enforcement officers, including the AFOSI, to request the issuance of a search warrant and direct that "military agents of the Department of Defense must obtain the concurrence of the appropriate U. S. Attorney's Office before seeking a search warrant."

service directive where the record did not demonstrate that the limitations were "directly tied to the protection of individual rights.").

Second, the military judge's findings, which were supported by the testimony of the agents involved, show that the OSI officers did not seek the warrant. Instead, they turned matters over to a civilian law enforcement officer having jurisdiction in El Paso County, the location of the place to be searched and a potential crime. See Mil.R.Evid. 315(b)(2) and (h)(4). The El Paso County officer sought the warrant, and he was not subject to any requirement to coordinate with a United States Attorney.

As noted by the court below:

> Following their interview of the appellant, the AFOSI informed the local civilian investigators of the nature of the crime they were investigating. They did so, according to their sworn testimony, because the appellant lived off base. Additionally, Falcon AFB is a concurrent jurisdiction installation; therefore, the local authorities had jurisdiction over the entire case, if they chose to investigate the offenses alleged....
>
> ....

The appellant further contends that 28 CFR § 60, as applied to the AFOSI by paragraph 6(c) of AFOSI Regulation 124-82 requires the AFOSI to obtain the concurrence of the United States Attorney's Office before requesting a civilian search warrant. The AFOSI did not request the warrant in this case. Rather, they merely participated in a search conducted under the auspices of a civilian search warrant. Therefore, we find that 28 CFR § 60.1 does not apply to the circumstances under which the search warrant in this case was obtained and does not preclude the AFOSI agents' participation in that search.

Unpub. op. at 7 (footnote omitted). We agree.

2. Whether the Posse Comitatus Act, 18 USC § 1385, was violated.

Appellant contends that the primary purpose of OSI participation was to aid the El Paso officer in the enforcement of Colorado law. Therefore, the participation of OSI agents in the search of his home was in furtherance of civil laws and in violation of the Posse Comitatus Act, which prohibits use of military personnel for enforcement of civil law. We disagree.

Appellant fails to consider the continuing military interest in the criminal investigation. Appellant, a person subject to the UCMJ, violated military law by receiving child pornography on a government computer. Appellant "probably" had additional prohibited child pornography at his residence. This crime of possessing child pornography was cognizable under the UCMJ at all times by virtue of appellant's military status. Therefore, we find that there was an independent military interest in the investigation of appellant. See United States v. Thompson, 33 MJ 218 (1991), cert. denied, 502 U.S. 1074 (1992). Therefore, there is no violation of the Posse Comitatus Act.

3. Whether the search warrant was a general warrant and not based upon probable cause.

The affidavit in issue provided probable cause to believe that appellant possessed contraband child pornography in his home. Probable cause is determined by the totality of the circumstances, and is a practical, common sense decision. Illinois v. Gates, 462 U.S. 213 (1983). Deference is accorded a judge or magistrate making a probable cause determination. Massachusetts v. Upton, 466 U.S. 727, 732-33 (1984); Illinois v. Gates, supra. There is no requirement for a higher standard of probable cause for material protected by the First Amendment; a showing that there is a fair probability that the material sought is obscene is sufficient. New York v. P. J. Video, Inc., 475 U.S. 868 (1986).

The information contained in the affidavit amply supports probable cause under the totality of the circumstances:

1. The Falcon AFB firewall detected graphic images being accessed on the internet from the base computer network;

2. A base computer was used to access an area denominated, in part, by the word "lolita" – a word associated with child pornography - and the computer was used to download several graphic images;

3. A government network technician began downloading the graphic image being accessed, observed what looked like two nude juvenile females, found the picture disgusting, and discontinued downloading the image;

4. The user of the government computer accessed the internet through "SUPER ZIPPO," an on-line service;

5. The government computer in question was identified, the four persons with access to the computer were interviewed, and appellant admitted using the computer during the time frame at issue but denied accessing the file in question;

6. Appellant initially denied being a member of an on-line service, then later admitted he was a member of "SUPER ZIPPO," and had access to the on-line service from his residence;

7. Appellant admitted having erotica at his residence, but when asked if any of the material contained children, stammered and asked, "What do you mean children?"

This information reasonably shows that appellant accessed child pornography through his on-line server while on duty, had access to the same service at his residence, had erotica at his residence, and was evasive about possessing child pornography at home. Thus, appellant's computer equipment and associated materials, such as discs or printed graphics, would be or would contain evidence of this contraband material. We find "substantial evidence in the record" to support "the decision to issue the warrant." See United States

v. Monroe, 52 MJ 326, 331 (2000), quoting Massachusetts v. Upton, 466 U.S. at 728.

Similarly, the warrant issued met the necessary requirements for specificity. "Attachment B" to the actual warrant lists those items subject to search as follows:

1. Photographic images of nude children.

2. Documents pertaining to the on-line service "Super Zippo."

3. Correspondence, diaries, and any other writings, tape recordings, computer files, or letters relating to any nude photographs of juveniles, internet locations for such material, or lists of such files.

4. Video tapes, magazines, books, and other items, which may contain nude images of children.

5. Items of indicia consisting of articles of personal property tending to establish the identity of the person or persons in control of the premises located at . . . El Paso County, Colorado, including, but not limited to, digitally stored files on computer disks or hard drives.

The listing provides three categories of items that may be searched for: (1) child pornography; (2) evidence pertaining to appellant's IAP account; and (3) evidence pertaining to identification of persons controlling the premises. This listing is clearly related to the information constituting probable cause. It specifically focuses on sources of child pornography, the computer system and service, and those who may be involved in criminal activity at this address. It is not general or overbroad. See United States v. Leon, 468 U.S. 897, 964 (1984)(Stevens, J., concurring); United States v. Lacy, 119 F.3d 742 (9th Cir. 1997, cert. denied, 523 U.S. 1109 (1998).

4. Whether the search warrant was obtained as a result of false statements to the state court magistrate judge.

Mil.R.Evid. 311(g)(2), Manual for Courts-Martial, United States (1995 ed.), provides:

> False statements. If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to a finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under these rules.

In light of the findings of fact entered by the military judge, it is clear that the defense did not meet its burden of showing "knowing and intentional falsity or reckless disregard for the truth." See Franks v. Delaware, 438 U.S. 154 (1978). These findings of fact are binding unless they are clearly erroneous.

Specifically, the military judge found: "After hearing the evidence, I am even more convinced that the affidavit was not knowingly and intentionally false, nor made with reckless disregard for the truth." We find no basis upon which to conclude that the findings are clearly erroneous.

5. Whether the warrantless search of appellant's internet account with "Super Zippo" violated the Fourth Amendment and the Electronic Communications Privacy Act.

Appellant urges that the information obtained from "Super Zippo" falls within the exclusionary rule because it was obtained in violation of the Electronic Communications Privacy Act of 1986 (ECPA), 18 USCA §§ 2510 et. seq., or because appellant had a Fourth Amendment privacy interest in the information.

In order to decide this issue, we must first determine where the information obtained from "Super Zippo" falls within the continuum of information available through computer and telecommunication technologies. The ECPA provides a framework to analyze this question: Title I of the Act is entitled "Interception of Communications and Related Matters"; Title II of the Act is entitled "Stored Wire and Electronic Communications Transactional Records Access"; and Title III of the Act is entitled "Pen Registers and Trap and Trace Devices." ECPA, Pub.L.No. 99-508, 100 Stat. 1848 (1986).

The information obtained from "Super Zippo" was electronic data stored by "Super Zippo" in the form of a log identifying the date, time, user, and detailed internet address of sites accessed by appellant over several months. Hence, it falls within Title II of the ECPA. Section 2703(c) regulates governmental access to a "record or other information pertaining to a subscriber or customer of such service (not including the contents of communications....)" 18 USC § 2703(c)(1)(A). Under the ECPA, the release of such records does not require a warrant. They may also be released upon a court order issued on the "reasonable grounds to believe" standard under § 2703(d). 18 USCA § 2703(c)(1)(B) and (d).

Although neither a warrant nor a court order was obtained, there is no exclusionary rule relief under § 2703. See United States v. Hambrick, 55 F.Supp.2d 504, 507 (W.D. Va. 1999); United States v. Kennedy, 81 F.Supp.2d 1103, 1110 (D. Kan.

2000). If Congress had intended to have the exclusionary rule apply, it would have added a provision similar to the one found under Title III of the statute, concerning intercepted wire, oral, or electronic communications. See 18 USC §§ 2516 and 2518(10).

Although suppression is not a remedy under Title II of the ECPA, courts must determine within a constitutional framework whether an accused has a subjective expectation of privacy that society is willing to recognize in the type of information obtained. We tackled this question in United States v. Maxwell, 45 MJ 406 (1996). There we found a limited expectation of privacy in e-mail messages sent or received through an IAP.[3] Most importantly, what was at issue in Maxwell was the treatment of communications. This case does not involve communications, but rather is limited to stored transactional records provided in log format without any accompanying text.

The Hambrick court found an internet customer to have no reasonable expectation of privacy in personal information supplied to an IAP because the customer knowingly revealed his name, address, credit card number, and telephone number to the IAP and its employees. 55 F.Supp.2d at 508. The information at issue lies somewhere between the type of subscriber information at issue in Hambrick and the communications at issue in Maxwell.

We need not decide what type of privacy interest attaches to the information in this case, however, because we agree with the military judge that a warrant would have inevitably been obtained for these very same records. See Mil.R.Evid. 311(b)(2); Nix v. Williams, 467 U.S. 431 (1984); United States v. Kozak, 12 MJ 389 (CMA 1982). In light of this holding, we

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[3] E-mails are treated differently under the ECPA depending upon how long they remain in storage with an IAP. See 18 USCA § 2703(a) (regulating the disclosure of electronic communications in storage in an electronic communications system for more or less than 180 days).

need not determine whether the information was otherwise admissible. See Mil.R.Evid. 314(e) and (k); 316(f).

The OSI agent was aware appellant admitted that "Super Zippo" was his IAP provider. He also knew that "Super Zippo" showed up in records related to the information accessed by appellant from the computer at appellant's military work station. The agent asked "Super Zippo" if a warrant was required, and was informed that corporate counsel had advised management that none was needed. The agent relied on that information and did not pursue a warrant. There is nothing upon which to support a claim that the information would not otherwise have been obtained or that the officers in this case were acting with other than complete good faith in relying upon "Super Zippo's" assertion that they had the authority to release the records without a warrant.

Thus, in the final analysis, the agent asked the person in possession of the information to turn it over to the police. This was done freely and voluntarily. The person in possession of the information did not demand that a warrant be produced and none was required. Under these circumstances, there is no seizure which could be said to be the result of a constitutional violation of such import as to bring into play any exclusionary rule, whether a statutory or court-made rule. See Mil.R.Evid. 314(e).

ISSUE II

Appellant alleges that his conviction for engaging in anal sodomy with a former wife is a violation of his fundamental right to engage in private consensual sexual relations without interference and regulation by the government. We disagree.

"The extent to which the constitutional right to privacy prohibits a prosecution for sexual relations within a marital relationship raises important constitutional questions. Any such constitutional right, however, must bear a reasonable relationship to activity that is in furtherance of or supportive of

the interests of the marital relationship." United States v. Thompson, 47 MJ 378, 379 (1997), cert. denied, 523 U.S. 1077 (1998).

We note that the charged acts of sodomy were not discovered as a result of a government investigation into appellant's marital activities, but were brought to the attention of authorities by appellant's former wife during the pornography investigation, who seized on the occasion to initiate a discussion with authorities concerning a pattern of abuse by her husband, which included the charged acts.

The facts of this case make it clear that appellant's acts were not in furtherance of the marriage. Regardless of whether the facts would have been sufficient to prove beyond a reasonable doubt that appellant engaged in forcible sodomy, they clearly demonstrate that the charged acts do not warrant constitutional protection because they were not "in furtherance of or supportive of the interests of the marital relationship." Id. Instead, the facts graphically depict a pattern of degradation and depersonalization, of which the acts of sodomy were a part, that appellant visited upon his former wife. Such a pattern falls outside the ambit of conduct that could be considered in furtherance of the marriage for purposes of determining whether the statute should be invalidated on constitutional grounds. In that regard, we emphasize that we are not engaged in a subjective evaluation of the quality of the marriage; rather, our consideration is focused on the reasonable inferences that may be drawn from the record concerning the nature of the charged acts in the context that immediately surrounded their commission.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

SULLIVAN, Judge (concurring in the result):

There was no prejudicial error when the military judge denied appellant's motion to suppress evidence seized from

appellant's home and from Super Zippo. Regarding the warrant obtained by the local civilian law enforcement officials to search appellant's home, there was no violation of the Posse Comitatus Act, see United States v. Thompson, 33 MJ 218 (CMA 1991), and the totality of the circumstances establish that the magistrate judge had sufficient information to determine that probable cause existed. See United States v. Monroe, 52 MJ 326 (2000). Appellant does not have a constitutional reasonable expectation of privacy in the records obtained from Super Zippo. See United States v. Maxwell, 45 MJ 406, 418 (1996). Furthermore, the Electronic Communication Privacy Act does not require suppression for failure to comply with its provisions, absent a violation of a constitutional right. Cf. 18 USC § 2703(c); United States v. Thompson, supra; United States v. Thompson, 936 F.2d 1249 (11th Cir. 1991).

The other granted issue involves Article 125, UCMJ, 10 USC § 925, which states:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Just as this Court has held that Article 125 prohibits private, heterosexual, consensual oral sex, see United States v. Henderson, 34 MJ 174 (1992), so too today the Court holds that anal sex is a violation of the statute. Cf. United States v. Thompson, 47 MJ 378 (1997). In the military, the law seems clear——any type of sodomy remains a crime. I will continue to apply the law as written, which makes no mention of a marital exception.

Appendix B

UNITED STATES,

v.

Lieutenant James M. ALLEN,
United States Air Force.

ACM 32727

U.S. Air Force Court of Criminal Appeals

Sentence Adjudged 20 January 1997.

Decided 22 April 1999.

OPINION OF THE COURT

SPISAK, Judge:

Officer members convicted the appellant of consensual sodomy, assault consummated by a battery, conduct unbecoming an officer, transporting sexually explicit depictions of children in interstate commerce, and soliciting his wife to commit prostitution, in violation of Articles 125, 128, 133 and 134, UCMJ, 10 U.S.C. §§ 925, 928, 933, and 934, respectively. They found him not guilty of threatening to kill his wife. His sentence included dismissal, total forfeitures, and confinement for 7 years.

The appellant raises seven errors for our consideration: (1) Conviction of consensual sodomy with his wife violates the appellant's constitutional right to privacy; (2) The military judge erred by denying a defense motion to suppress evidence obtained during a search of the appellant's residence, and evidence obtained on request from Super Zippo, an internet news group provider; (3) The evidence is factually and legally insufficient to sustain the finding of guilty to the charge of

soliciting his wife; (4) The evidence is factually insufficient to sustain the finding of guilty to the charge of assaulting his wife; (5) The sentence is inappropriately severe; (6) The military judge erred by failing to sever the charges; and, (7) Application of Article 57(a), UCMJ, 10 U.S.C. § 857(a), to the appellant's case violates the *Ex Post Facto* Clause of the United States Constitution. We affirm.

I. FACTS

On 31 July 1996, while monitoring the Falcon Air Force Base (AFB) Local Area Network (LAN), a technician observed the words "pictures.erotica" on the screen, indicating that someone on Falcon AFB was accessing that cite. The technician, Mr. Mugele, determined that the computer operator was attempting to download a graphics file entitled "leg16.jpg." Mr. Mugele traced the file to its source, a service group with the internet address of "zippo.com." Mr. Mugele started downloading the file to his own screen but stopped when the picture was about 25 percent visible because he realized that it contained a depiction of two, apparently unclothed, children standing face to face. He immediately stopped the download, reported the incident to his supervisor, and identified the computer which had accessed the cite and downloaded the picture. Another supervisor reported the incident to the Air Force Office of Special Investigations (AFOSI), which began an investigation.

Although four people had access to the computer in question, at the time the picture was being downloaded, only one person, the appellant, was physically in the work area where the computer was located. While being interviewed under advisement of his rights under Article 31(b), UCMJ, the appellant admitted that he had used the computer during the time of the attempted download of the picture, but denied ever accessing or downloading child pornography. The appellant also admitted subscribing to a news group called Super Zippo and to having some erotica at his home. When asked whether

the erotica included any child pornography, he stammered and asked, "What do you mean by children?" He declined to consent to a search of his off-base quarters.

Because the house in which the appellant lived was under the jurisdiction of the local civilian police, and because Falcon AFB, a concurrent jurisdiction installation, is also subject to local civilian jurisdiction, the AFOSI agents informed the civilian police what they were investigating. The civilian police investigator obtained a search warrant from a local judge. Two AFOSI agents accompanied the police investigator to the appellant's home and assisted in the search.

During the search of appellant's home, the investigators seized 476 computer disks, 11 compact disks, two computers, an electronic mail message, and pictures of nude adult women. Immediately after the search, the civilian investigator relinquished jurisdiction in favor of the AFOSI because the civilian jurisdiction lacked facilities and manpower to analyze the numerous computer disks. Later analysis of the computers and computer disks revealed some 707 occurrences of child pornography and 58 occurrences of obscene material.

Upon request from the AFOSI, Super Zippo sent copies of the appellant's access and payment records to the investigators without requiring a search warrant or other legal demand.

The AFOSI also questioned the appellant's ex-wife, KA, to determine what she knew about the appellant's involvement with child pornography. While KA knew nothing of such involvement, she said she could tell the investigators things that would make them blush. Over the course of three further interviews, she told them that during a period of financial difficulty her husband had encouraged her to prostitute herself for the financial benefit of the family and because it would improve their sexual relations. She also alleged that the appellant had assaulted her by strangling her on two occasions, that he had twice threatened to kill her, and that he had frequently performed anal intercourse with her.

II. CONSENSUAL SODOMY BETWEEN HUSBAND AND WIFE

The appellant contends that his conviction for the offense of sodomy with his wife is a violation of his constitutionally protected right to privacy. This Court has the authority "to decide constitutional issues—even those concerning the validity of the Uniform Code [of Military Justice (UCMJ)]." *United States v Matthews*, 16 M.J. 354, 366 (C.M.A. 1983) (holding that, as an Article I court, the Court of Military Appeals has authority to determine constitutionality of the UCMJ and any other statute involved in a case pending before it). The standard of review for constitutional claims of this sort is *de novo*. *Jacobellis v Ohio*, 378 U.S. 184, 190 (1964).

Our first inquiry must determine whether there is a constitutional right to privacy, which prevents charging a military member with sodomizing his consenting spouse or whether, even if such a right exists, there is a compelling governmental interest which would justify intrusion into their marital relationship. *Kramer v Union Free School District*, 395 U.S. 621, 627 (1969); *Sherbert v Verner*, 374 U.S. 398, 406 (1963). If we find such a governmental interest, we must then determine whether or not Article 125, UCMJ, is drawn narrowly enough to protect only that governmental interest. *Griswold v Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker v Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell v Connecticut*, 310 U.S. 296, 307-308 (1940).

a. Right to Privacy

The Supreme Court has recognized a private sphere of individual liberty that is beyond the reach of the government. *Thornburgh v American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). The Court has also identified certain "zones of privacy." *Roe v Wade*, 410 U.S. 113, 152 (1973). It has concluded that the right of personal privacy includes "making certain kinds of important decisions." *Whalen v Roe*,

429 U.S. 589, 599-600 (1977). Those include those decisions related to child rearing and education (*Pierce v Society of Sisters*, 268 U.S. 510 (1925)); family relationships (*Prince v Massachusetts*, 321 U.S. 158 (1944)); procreation (*Skinner v Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)); marriage (*Loving v Virginia*, 388 U.S. 1 (1967)); contraception (*Griswold v Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v Baird*, 405 U.S. 438 (1972)); and, abortion (*Roe v Wade*, 410 U.S. 113 (1973)).

The Supreme Court has also determined that these privacy interests do not prevent the government from proscribing sexual acts between adult members of the same sex. *Bowers v Hardwick*, 478 U.S. 186 (1986). Government appellate counsel would have us extend this logic to the marital bedroom. However, in *Hardwick*, the Court specifically noted that "none of the rights announced in [the cases cited above] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy. . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated. . . ." *Id.* at 191. This cannot be said of the case before us. I agree with our superior court's conclusion that the majority opinion in *Hardwick* did not suggest that "the sanctity of the marital bedroom is in jeopardy." *United States v Henderson*, 34 M.J. 174, 178n.8 (C.M.A, 1992).

While government appellate counsel may be correct that *Hardwick* signals a move by the Supreme Court to modify its earlier decisions and avoid expanding the right to privacy, I see nothing in *Hardwick* which suggests that the Court has, or will move so far as to permit the government to invade the sanctity of intimate decisions between a husband and wife concerning how they will express their affection in physical terms. Until our superior court or the Supreme Court tells us otherwise, I am convinced that the right of privacy extends to the intimacies of the physical relationship between husband and wife.

b. Compelling Interest

Our superior court has declined to invalidate sodomy charges when the act occurs in private between consenting adults who are not married to one another. *United States v Fagg*, 34 M.J. 179 (C.M.A. 1992); *Henderson*. The courts have also rejected arguments that consensual sodomy in "semi-private" circumstances is constitutionally protected. *United States v Scoby*, 5 M.J. 160 (C.M.A. 1978). Convictions where the sodomy was accomplished through the use of force have also been upheld. *United States v Womack*, 29 M.J. 88 (C.M.A. 1989). Other panels of this Court have affirmed convictions for consensual sodomy between a husband and his wife when the sodomy was accompanied by force, or where the husband took the act out of the realm of marital privacy by showing videotape of the act to a friend. *United States v Harlon* ACM 32650, (A.F. Ct. Crim. App. Feb. 6, 1998) (husband video taped bondage and anal sodomy of wife then showed to friend) (unpub. op.); *United States v Thompson*, ACM 31803 (A.F. Ct. Crim. App., Aug. 8, 1996) (unpub. op.). (wife performed sodomy on husband to distract him from beating her), *aff'd*, 47 M.J. 378 (1997).

The case before us lacks any evidence that the appellant was beating his wife or otherwise threatening her during or immediately prior to the acts of sodomy. While the appellant stands convicted of assaulting his wife and soliciting her to commit prostitution, there is no obvious connection between either of these charges and the acts of sodomy. Rather, appellant's ex-wife, KA, testified that even though he knew that she did not enjoy anal intercourse, the appellant would "lay in bed next to [her] and push [her] until [she] agreed. . . . [I]t didn't matter if it took 10 minutes or two hours. He would sit there and nudge on [her] until [she] agreed, and tell [her] that it's the only way [he could] be satisfied. . . . " I find these facts insufficient to compel us to rely on this Court's prior decisions. Therefore, I believe that we must next look for a compelling interest that does not rely on protecting a spouse from physical abuse or unlawful coercion.

More than two decades ago, the Supreme Court explained that, in the military, constitutional protections sometimes take on a different complexion.

[T]he different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside of it.

Parker v Levy, 417 U.S. 733, 758 (1974); *see also United States v Witham*, 47 M.J. 297 (1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1051 (1998) (no military exigency or necessity requiring that a military accused have an unfettered right to peremptorily challenge court members); *United States v Mitchell*, 39 M.J. 131 (1994) (application of civilian standard to determination of fairness of a tribunal is not appropriate in courts-martial); *United States v McCarthy*, 38 M.J. 398 (C.M.A. 1993) (Fourth Amendment protections do not give a military accused the right of sanctuary from apprehension in his dormitory room). While these cases clearly establish that constitutional rights may sometimes be limited in the military context, they still require finding a sufficiently strong governmental interest, such as obedience and discipline, to justify the limitation. Government appellate counsel did not address the issue of compelling governmental interest, or suggest how private marital relations impact morale, discipline or obedience. Therefore, we are left to find such interest, if indeed one exists, without their assistance.

I would find that where, as here, there is no violence and the acts which lead to a charge of sodomy are consensual, neither morale, nor discipline, nor the interest in obedience which was noted in *Parker*, justifies governmental intrusion into the private decisions of a married couple. Having found no compelling government interest that justifies the violation of the appellant's constitutional right to privacy, I would find that

Article 125 is unconstitutional as applied to this case and set aside the finding of guilty of sodomy, Charge II.[1] However, my brother judges do not agree.

III. SUPRESSION OF EVIDENCE

The appellant complains that the military judge improperly admitted evidence obtained during searches of his home and his Super Zippo account. He alleges that the search of his home was faulty because (1) the AFOSI agents failed to seek concurrence from the United States Attorney's Office in violation of AFOSI Regulation 124-82 *Search and Seizure* ¶ 6(a) (January 4, 1985); (2) there was no probable cause for the search; (3) the warrant was a "general warrant" in violation of the Fourth Amendment; (4) the evidence was seized in violation of Colorado law because the Colorado police investigator turned the evidence over to the AFOSI without making a return to the court; and, (5) the good faith exception does not apply. He asserts that his Super Zippo account records were obtained without any warrant in violation of the Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. § 2703(b)(1)(A)-(B), (c)(1)(B), and that these records were sought only after completion of the allegedly unlawful search of appellant's home. Therefore, the appellant contends that the Super Zippo records must be suppressed as fruit of the poisonous tree.

A military judge's ruling on the admission or exclusion of evidence, including rulings on motions to suppress, are reviewed for an abuse of discretion. *United States v Ayala*, 43 M.J. 296 (1995); *United States v Agosto*, 43 M.J. 745, 748 (A.F.

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[1] Although the appellant refers to the sodomy charge as Charge I, the original Charge I was withdrawn after arraignment and the remaining charges were renumbered for the members. The original Charge Sheet and the Court-Martial Order, however, used the original charge numbers. Therefore, the first charge presented to the members appears on the charge sheet as Charge II and will be referred to as Charge II throughout this opinion.

Ct. Crim. App. 1995). As search issues generally are mixed questions of fact and law, we review a military judge's findings of fact under a clearly erroneous standard, and we review the military judge's conclusions of law under a *de novo* standard of review. A military judge abuses his or her discretion on a motion to suppress only if the factual findings are clearly erroneous or the law is applied erroneously. *Ayala*, 43 M.J. at 298; *United States v Burris*, 21 M.J. 140, 144 (C.M.A. 1985). We hereby adopt the military judge's findings of fact as our own. Article 66(c), UCMJ, 10 U.S.C. § 866(c).

a. Search of Appellant's Off-Base Home

Following their interview of the appellant, the AFOSI informed the local civilian investigators of the nature of the crime they were investigating. They did so, according to their sworn testimony, because the appellant lived off base. Additionally, Falcon AFB is a concurrent jurisdiction installation; therefore, the local authorities had jurisdiction over the entire case, if they chose to investigate the offenses alleged. The local investigator believed there was probable cause for a search based on the fact that (1) the appellant admitted using the office computer during the time that the picture of the nude children was being downloaded; (2) he admitted having a Super Zippo account; (3) the base computer technician had traced the downloaded picture back through the Super Zippo news group; (4) the appellant admitted having access to Super Zippo at home; (5) and he admitted to having erotica in his home. He was also evasive when asked about child pornography. The civilian judge issued the warrant.

We review a judge's determination to ensure that he had a "substantial basis" on which to conclude that probable cause existed. *United States v Light*, 48 M.J. 187 (1998); *United States v Hester*, 47 M.J. 461, *cert. denied*, __ U.S. __, 119 S. Ct. 125 (1998); *United States v Figueroa*, 35 M.J. 54, 56 (C.M.A. 1992) (quoting *Illinois v Gates*, 462 U.S. 213, 238-239 (1983)). Applying this standard, we find that the civilian judge clearly

had a substantial basis for determining that appellant probably possessed child pornography. Therefore, the search warrant was supported by probable cause.

The appellant further contends that 28 C.F.R. § 60; as applied to the AFOSI by paragraph 6(c) of AFOSI Regulation 124-82,[2] requires AFOSI to obtain the concurrence of the United States Attorney's Office before requesting a civilian search warrant. The AFOSI did not request the warrant in this case. Rather, they merely participated in a search conducted under the auspices of a civilian search warrant. Therefore, we find that 28 C.F.R. §60.1 does not apply to the circumstances under which the search warrant in this case was obtained and does not preclude the AFOSI agents' participation in that search.

We find no validity in appellant's remaining complaints against the search of his home and find the military judge did not err in admitting the evidence from that search.

b. Request for Super Zippo Records

The appellant attacks the admission of account records obtained from Super Zippo because the AFOSI failed to either obtain a search warrant or notify the appellant of its intent to obtain these records. He argues that such failure violated the clear provisions of the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2703(c), and requires suppression of all evidence obtained from Super Zippo.

Section 2703(c)(1)(B) provides, in relevant part, that:

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[2] At trial, defense counsel cited AFOSI Instruction 71-106 for the proposition that AFOSI must seek U.S. Attorney concurrence before seeking civilian search warrants. Neither the regulation nor the instruction were presented for our consideration. Nor was any explanation given concerning why two different citations were used; however, because the government did not object to the appellant's interpretation, we will accept the appellant's contention that there is a regulatory requirement for concurrence of the U.S. Attorney's Office before AFOSI agents seek a civilian search warrant.

[A] provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service . . . to a governmental entity only when the governmental entity – (i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant; (ii) obtains a court order for such disclosure under subsection (d) of this section; (iii) has the consent of the subscriber or customer to such disclosure; or . . . .

There is no dispute the AFOSI neither obtained a search warrant nor notified the appellant of the attempt to obtain his Super Zippo records. However, the appellant's argument that this failure requires suppression of the evidence fails for two reasons. First, the Fourth Amendment to the United States Constitution "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v Miller*, 425 U.S. 435, 443 (1976) (citing *United States v White*, 401 U.S. 745, 751-52 (1971)). *See Smith v Maryland*, 442 U.S. 735, 742 (1979) (holding that the installation of a pen register on the defendant's telephone did not violate his Fourth Amendment rights because there was no reasonable expectation of privacy in the telephone numbers dialed).[3] Therefore, in order for the appellant to succeed on this allegation of error, there must be a statutory proscription that

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[3] Congress statutorily overrruled *Smith v Maryland*, 442 U.S. 735 (1979), in 18 U.S.C. § 3121(a), by prohibiting installation of a pen register without a court order. However, evidence obtained in violation of the statute can be admitted in criminal trials because violation of the statute does not result in an unconstitutional search and Congress did not provide for exclusion of evidence for violation of the statute. *United States v Thompson*, 936 F.2d 1249 (11th Cir. 1991), *cert. denied*, 502 U.S. 1075 (1992).

excludes admissibility of the appellant's records from Super Zippo.

Sections 2703(a) and (b) of the ECPA authorize a governmental entity to require a provider of electronic communication service to disclose the contents of an electronic communication, but only if the governmental entity first obtains a warrant, court order, or administrative subpoena. On the other hand, section 2703(c), which authorizes release to the government of records pertaining to a subscriber, provides only that a provider of such service may not give a governmental entity records unless presented with a warrant, court order, or consent of the customer.[4] Clearly, when the government asked for these records, Super Zippo should have required a warrant. Whether or not the evidence received from Super Zippo should be suppressed, however, requires that the ECPA contain either a clear prohibition against the agents' accepting the information, or a specific remedy for the appellant. There is nothing in subsection 2703(c) that prohibits the governmental entity from accepting or asking for such records. We must, therefore, turn to the remedies provided by the ECPA.

Subsection 2708 of the ECPA provides that "[t]he remedies and sanctions described in this chapter (18 U.S.C. §§ 2701 *et seq.*) are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." Subsection 2707 then sets out specific civil actions, which may flow from a violation of 2703. The remedies set out in subsection 2707(b), however, are limited to equitable and declaratory relief, damages, and reasonable attorney's fees and costs of litigation. There is a provision for disciplinary action by the governmental entity against its agents, however, such discipline flows from a court finding that the agency violated the ECPA. Congress

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[4] 18 U.S.C. § 2703(c) provides a fourth means of obtaining records from an electronic communications provider, however, that provision, giving the provider a formal written request, applies only in cases where the government agent is investigating allegations of telemarketing fraud.

could have included an exclusionary rule in its list of sanctions, but it chose not to do so. Therefore, exclusion of evidence is not required by a violation of the ECPA. *See United States v Wooten*, 34 M.J. 141, 146-147 (1992); *United States v Moreno*, 23 M.J. 622, 624 (A.F.C.M.R. 1986) (holding remedies contained in the Right to Financial Privacy Act, 12 U.S.C. § 3406, are exclusive and do not prevent admission of financial records obtained in violation of that act).

Moreover, under the plain language of the statute, only providers of electronic communications can violate section 2703(c) by improperly disclosing to the government information pertaining to a subscriber or a customer. *See Tucker v Waddell*, 83 F.3d 688, 693 (4th Cir. 1996). We encourage government agents to obtain warrants, court orders, administrative subpoenas, or even the consent of the subscriber, before seeking records from an electronics communications provider. However, suppression of the evidence obtained is not an available remedy for their failing to do so.

For the foregoing reasons, we find that the military judge did not abuse his discretion by admitting the Super Zippo records.

IV. FACTUAL AND LEGAL SUFFICIENCY

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we approve only those findings of guilty that we determine to be correct in both law and fact. The test for legal sufficiency is whether, when the evidence is viewed in the light most favorable to the government, a reasonable factfinder could have found the appellant guilty of all elements of the offense, beyond a reasonable doubt. *United States v Turner*, 25 M.J. 324, 325 (C.M.A. 1987) (citing *Jackson v Virginia*, 443 U.S. 307 (1979)); *United States v Ladell*, 30 M.J. 672, 673 (A.F.C.M.R. 1990). The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having

observed the witnesses, we are convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

a. Solicitation To Commit Prostitution

The appellant contends that he cannot be found guilty of soliciting his then wife, KA, to commit prostitution because KA and her "clients" were civilians. Therefore, he argues that the government's failure to put on any evidence that KA's acts were either prejudicial to good order and discipline, or brought discredit upon the armed forces requires that we set aside the finding of guilty to Charge V,[5] Specification 2. This argument is fatally flawed in that the appellant was not charged with prostitution, but with soliciting another to commit prostitution. Therefore, we must determine not whether KA's acts were prejudicial to good order and discipline or brought discredit on the armed forces, but whether the appellant's act of solicitation did so.

In *United States v Miller*, 44 M.J. 549 (A.F. Ct. Crim. App. 1996), *rev'd on other grounds*, 47 M.J. 352 (1997), we found that an noncommissioned officer who asked civilian girls to engage in sexual intercourse for hire was guilty of soliciting another to commit prostitution. We then had "no difficulty in finding that under the circumstances of [that] case asking others to engage in sex for compensation [was] prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces." *Id.* at 556. In the case before us, we have an officer who encouraged, even cajoled his own wife, a civilian, to have sexual relations with men for money. When she called him to say she had been propositioned, the appellant specifically told her to go with the man. His justification to her was that the money would help pay the family debts and because such acts would somehow improve their marital relations and make her less of a "prude."

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[5] The appellant refers to Charge IV; however, the designation for the charge of soliciting prostitution remained Charge V, Specification 2, even after Charge I was withdrawn. See note 1.

In addition to KA's testimony about her prostitution and the appellant's part in her doing so, one of KA's clients testified that KA told him that her prostitution was done at her husband's instigation. Finally, during much of the time that the appellant was encouraging his wife's prostitution, the appellant's sister-in-law, MG, was living in his home. While MG was not aware that the appellant had solicited his wife's actions, MG testified that the appellant knew that KA was prostituting herself and that he made no effort to stop KA from doing so. As in *Miller*, we have no difficulty saying that under all of the circumstances of this case, the appellant's actions were to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.

Having reviewed the record in its totality, we are ourselves convinced beyond a reasonable doubt of the appellant's guilt of solicitation to commit prostitution. We are also satisfied that the evidence presented provided a sufficient basis for a reasonable factfinder to find the appellant guilty of this offense beyond a reasonable doubt.

b. Assault Consummated By Battery

The appellant next contends that the evidence in support of the finding of guilty to assault consummated by a battery is factually insufficient because the primary witness and victim, KA, is unreliable and because there is no physical evidence or contemporaneous report to support KA's allegations.

KA testified that on two occasions the appellant grabbed her by the neck, choked her and banged her head against the floor or a door. KA testified that she didn't report these assaults to any authorities because the appellant's career was more important. KA's medical records from the period do not include any reference to bruises of the neck or head even though she had sought treatment for a sore throat. Additionally, KA's sister, MG, was living in the home during this period. MG testified that she never heard any arguments

between the appellant and KA, and never saw any evidence of violence by the appellant toward KA. However, the testimony of MG is suspect because of her deep-seated, though understandable, hostility toward KA.[6] Additionally, four months after the last incident of choking, KA reported the two assaults to Dr. S, a psychologist. There is no apparent motive for falsely reporting these acts to Dr. S particularly in light of the fact that KA did not then heed the doctor's advice to "consider other options" rather than remaining with the appellant. Later still, in January 1993, KA reported the assaults to Mr. W, a clinical social worker, and to the attorney representing her in divorce proceedings against the appellant. It was not until September 1996, that KA reported the incident to any law enforcement official. That report was made to AFOSI investigators who came to her seeking information about the allegations that the appellant possessed child pornography.

Having carefully reviewed the record of trial, we are convinced beyond a reasonable doubt of the appellant's guilt of the offense of assault consummated by a battery.

V. FAILURE TO GRANT MOTION TO SEVER CHARGES

The appellant asserts that the military judge erred by denying his motion to sever the pornography charges from those related solely to his ex-wife. He argues that because the charges were unrelated in time or nature and because the evidence of one set of offenses could not be used to prove the commission of the other set of offenses, joinder was a "manifest injustice." He argues that the evidence of child pornography so affected the members that they could not fairly

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[6] When MG's infant daughter died, KA accused MG of causing the death and was allegedly instrumental in obtaining an AFOSI investigation into the death.

evaluate the evidence presented on the other charges. We do not agree.

Rule for Courts-Martial (R.C.M.) 601(e)(2) provides: "In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both." However, a motion to sever may be granted in order "to prevent manifest injustice." R.C.M. 906(b)(10). We review a military judge's denial of a motion to sever for abuse of discretion. *United States v Foster*, 40 M.J. 140 (C.M.A. 1994).

The sort of spillover of which the appellant complains is not the test for whether the military judge should grant a severance; rather, the test is whether or not a manifest injustice resulted from the joinder. *United States v Curry*, 31 M.J. 359, 372-73 (C.M.A. 1990). Here, appellant's own argument seems to negate his theory of prejudice. As the Court of Appeals for the Armed Forces, then the Court of Military Appeals, pointed out in *United States v Haye*, 29 M.J. 213, 215 (C.M.A. 1989), "where the offenses are totally dissimilar" the danger of prejudice to an accused "is less likely."

In any event, the military judge specifically instructed the members that they must keep the evidence proving one offense "separate" from the evidence proving another and that "[p]roof of one offense carries with it no inference that the accused is guilty of any other offense." Such an instruction on spillover reduces the risk that court members will improperly use one offense to prove another. *Foster*, 40 M.J. at 148 (citing *United States v Hogan*, 20 M.J. 71, 73 (C.M.A. 1985)). Moreover, the fact that the members acquitted the appellant of threatening to kill KA and convicted him not of aggravated assault but assault consummated by a battery, indicates that they heeded the judge's instruction. We conclude that the military judge did not abuse his discretion in denying the motion to sever and avoided any spillover by a tailored instruction.

VI. *EX POST FACTO* EFFECT OF ARTICLE 57(a)

The appellant's *ex post facto* argument has been decided adversely to him by our superior court. In *United States v Gorski*, 47 M.J. 370 (1997), the Court of Appeals for the Armed Forces ruled that the application of Article 57(a) to crimes committed before 1 April 1996, the effective date of the changes to this article, violates the *Ex Post Facto* Clause of the Constitution. However, in subsequent decisions, our superior court ruled that the *Ex Post Facto* Clause is not violated if at least one of the accused's crimes occurred after 1 April 1996. *United States v Carter*, 49 M.J. 392 (1998).

The appellant was found guilty of several offenses involving obtaining, possessing, and transporting child pornography between May 1995 and August 1996. In fact, the appellant downloaded the picture, which started the investigation on 12 July, 1996, well after the effective date of Article 57(a). Therefore, the application of Article 57(a) to his case does not violate the *Ex Post Facto* Clause of the Constitution.

VII. SENTENCE APPROPRIATENESS

Article 66(c), UCMJ, in addition to mandating that we be satisfied of the legal and factual sufficiency of the findings, also requires that we approve only so much of the sentence as we find "should be approved." In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the accused gets the punishment he deserves. Performing this function does not authorize this Court to exercise clemency. *United States v Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner by which we discharge this responsibility is to give individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of the appellant's service. *United States v Snelling*, 14 M.J. 267 (C.M.A. 1982). Applying this standard, we do not find appellant's sentence inappropriately severe. Article 66(c), UCMJ.

VIII. CONCLUSION

The findings are correct in law and fact, and no error prejudicial to the substantial rights of the accused occurred. Accordingly, the findings and sentence are AFFIRMED.

YOUNG, Senior Judge (concurring in part and dissenting in part):

I concur with Judge Spisak's opinion, except for Part II.

The accused was convicted of engaging in anal sodomy with his wife on divers occasions. The evidence established that these acts occurred in private. The accused asserts that his conviction for private consensual acts with his wife must be set aside because it violates his constitutional right to privacy. Judge Spisak agrees. I do not believe the accused has made the case that Article 125 is unconstitutional as applied to married couples. Furthermore, even if Judge Spisak is correct as to the constitutionality of the statute, I would still deny the accused any relief. His acts of anal sodomy were not consensual such as to be in furtherance or support of the marital relationship.

A military member who engages in "unnatural carnal copulation with another person of the same or opposite sex" is guilty of sodomy. Article 125, UCMJ, 10 U.S.C. § 925. "Unnatural carnal copulation" includes placing the male sexual organ into the anus of another person. *Manual for Courts-Martial, United States* (*MCM*), Part IV, ¶ 51c (1998 ed.). Contrary to popular belief, Congress did not distinguish between forcible and consensual sodomy in Article 125. Article 125 prohibits sodomy, period. In the military, the concept of forcible sodomy exists only as an aggravating factor for which the President has authorized a substantially higher sentence to confinement—from 5 years (sodomy) to life (sodomy committed by force and without consent). *MCM*, Part IV, § 51e(1) and (4). The failure of the prosecution to

allege or to prove forcible sodomy does not result in a finding that the sodomy was consensual, only that the maximum confinement that may be adjudged is limited to 5 years. Likewise, Article 125 makes no exception for the private acts of sodomy committed between a husband and his wife.

Judge Spisak relies heavily on *Bowers v Hardwick*, 478 U.S. 186 (1986), to support her conclusion that Article 125 is unconstitutional as applied to consensual conduct between marriage partners. Hardwick was charged with committing sodomy with another man, in the privacy of his bedroom, in violation of a Georgia statute. Based on prior Supreme Court cases, Hardwick claimed that he had a right to privacy that extended to homosexual sodomy. The Supreme Court disagreed, holding that there was no constitutional right for homosexuals to engage in acts of consensual sodomy. The Court specifically declined to express any opinion on the constitutionality of the statute as applied to other acts of sodomy, such as between a husband and his wife. *Id.* at 188 n.2. The Court did, however, suggest an approach to be used for analyzing due process claims.

First, the Court requires that the issue be narrowly framed and focused on the specific activity in question. After criticizing prior holdings which interpreted the Fifth and Fourteenth Amendments to the Constitution as having "substantive content," the Court identified two approaches for identifying "the nature of rights qualifying for heightened judicial protection," (at 191): (1) "Those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'" at 191-92 (quoting *Palko v Connecticut*, 302 U.S. 319, 325 (1937)); and (2) "Those liberties that are 'deeply rooted in this Nation's history and tradition,'" at 192 (quoting *Moore v East Cleveland*, 431 U.S. 494, 503 (1977)). Based on an examination of the historical proscriptions against Hardwick's conduct, the Court concluded that "neither of these formulations would extend a fundamental right to

homosexuals to engage in acts of consensual sodomy." *Id.* at 192.

The Court of Military Appeals used the *Hardwick* formulations in analyzing a case in which the accused was convicted of sodomy, under Article 125, UCMJ, for requesting and receiving consensual fellatio from a female. *United States v Henderson*, 34 M.J. 174 (C.M.A. 1992). While recognizing that many jurisdictions have decriminalized "private, noncommercial, heterosexual, consensual fellatio among adults," the Court refused to overturn the accused's conviction. "[A]bsent authority from the Supreme Court, we cannot declare that there is a right to privacy in the Constitution that invalidates an Act of Congress outlawing fellatio." *Id.* at 178.

> Under the Constitution, "Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'" *Weiss v United States*, 510 U.S. 163, 177 (1994); *see* U.S. Const., art. I, § 8, cl. 14. While members of the armed forces are not excluded from the protections of the Constitution, "the different character of the military community and of the military mission requires a different application of those protections." *Parker v Levy*, 417 U.S. 733, 758 (1974).

United States v Douty, 48 M.J. 102, 106 (1998). *See Goldman v Weinberger*, 475 U.S. 503, 510 (1986) (holding regulations prohibiting wearing of yarmulke while in uniform were constitutional); *Brown v Glines*, 444 U.S. 348, 361 (1980) (upholding military regulations requiring command approval before distributing petitions within a military installation).

Despite the Supreme Court's recognition of the unique role Congress plays in establishing the rules and regulations governing the military, Judge Spisak has given no deference whatsoever to Congress' decision to prohibit all sodomy.

Instead, she extrapolates civilian case law to find a right to engage in anal sodomy where none exists, and then applies it wholesale to the military. Even if she is correct in finding that anal sodomy is included in the zone of privacy of married couples, that does not automatically invalidate Article 125. Congress may still regulate such zones of privacy if it has a sufficient interest in doing so. *See United States v Bygrave*, 46 M.J. 491, 495-96 (1997) (Congress can regulate if it has a *compelling* interest) (citing *Carey v Population Services International*, 431 U.S. 678, 685-86 (1977)). *But see Levy*, 417 U.S. at 760 (claims of overbreadth "must be accorded a good deal less weight in the military context").

While the courts have been reluctant to intervene into the privacy of the marital relationship, I do not believe that Article 125 is unconstitutional as applied to married couples. The first step in our analysis must be to narrowly frame the issue by focusing on the specific activity in question. *Bowers*, 478 U.S. at 191. In this case, the issue is whether there is a constitutional right for a married couple to engage in acts of anal intercourse. The ability of married couples to engage in anal intercourse is neither a fundamental liberty implicit in the concept of ordered liberty such that neither liberty nor justice would exist if it were sacrificed, nor a liberty that is deeply rooted in this Nation's history and tradition. Furthermore, I believe that to declare Article 125 unconstitutional would contravene our superior court's refusal to invalidate Article 125 without authority from the Supreme Court. *See Henderson*, 34 M.J. at 178. *Cf. United States v Allbery*, 44 M.J. 226, 228 (1996) (quoting 20 Am. Jur. 2d Courts § 186 (1965): "A precedent-making decision may be overruled by the court that made it or by a court of higher rank.").

Even if I were to agree that it was unconstitutional for Congress to prohibit anal sodomy between a husband and his consenting wife, I would still not grant the accused any relief. The Court of Appeals for the Armed Forces has recognized that "[t]he extent to which the constitutional right to privacy

prohibits a prosecution for sexual relations within a marital relationship raises important constitutional questions. Any such constitutional right, however, must bear a reasonable relationship to activity that is in furtherance of or supportive of the martial relationship." *United States v Thompson*, 47 M.J. 378, 379 (1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1523 (1998) (sustaining accused's conviction of sodomy where his wife attempted to divert his attention from reloading weapon he had threatened her with by performing fellatio on him). Judge Spisak claims not to condone the accused's actions or the pressure he placed on his wife, but finds no evidence of unlawful coercion justifying a governmental intrusion into the marriage. In doing so, she compartmentalizes the accused's conduct by focusing on the accused's actions immediately before he engaged in anal sodomy, rather than viewing the relationship between KA and the accused as a whole.

The accused and his wife, KA, had a complicated and unconventional relationship. KA worked as a waitress to help pay down the couple's large debt. A friend told KA that she could make considerably more money by dancing on stage in nightclubs. KA told her husband, who convinced her to try it. During her first night of dancing, a patron offered to pay her to have sex with him. She declined, but told the accused about the proposition. The accused encouraged, cajoled, and solicited KA to prostitute herself for the benefit of the family finances and to improve their sexual relationship. On one occasion, the accused committed a battery upon KA by sitting on her and beating her head against the floor in the bedroom while choking her. The accused stopped and let her up only after their child wandered into the room. This attack caused blood to come out of her nose, severe bruising around the neck, and left her gasping for air.

Although the accused liked to have anal intercourse, KA did not enjoy it. At first, she refused to participate and the accused did not pursue the idea. Once KA began to dance in clubs and perform acts of prostitution, the accused became

more aggressive in his sexual demands. KA told her husband on numerous occasions that she didn't like anal intercourse. She had been forcibly sodomized when she was 15-years-old and did not want to do it because it hurt her. In fact, she advised her prostitution customers that she absolutely would not engage in anal intercourse. Nevertheless, the accused would lay next to her and push her, "it didn't matter if it took 10 minutes or two hours. He would sit there and nudge on me until I agreed, and tell me that it's the only way [he could] be satisfied; you have to do it." KA even permitted the accused to videotape one of these acts with the understanding that she wouldn't have to do it again. The accused reneged on the agreement and continued to pressure her to submit to anal intercourse. "It wasn't really a question of agreeing. It was a question of eventually just giving in. He was very persistent." The pain from the acts of anal sodomy caused her to cry regularly and, on a few occasions, scream.

Under all the circumstances of this case, I am unable to conclude that the acts of sodomy were truly consensual or that the accused's conduct was in furtherance or support of the marital relationship. I disagree with Judge Spisak's assessment that the criminalization of the accused's conduct impermissibly invades the sanctity of intimate decisions between a husband and wife.

SCHLEGEL, Judge (concurring in part and dissenting in part):

I concur with Parts I, III, IV, V, VI, and VII of Judge Spisak's opinion but disassociate myself with Part II. Judge Spisak finds that a right of privacy exists within a marital relationship that extends to consensual physical intimacy between a husband and wife. Further, because she detects no compelling governmental interest or overriding military exigency for intruding upon this right, she would declare Article 125, UCMJ, 10 U.S.C. § 925 unconstitutional.

"The power to define crimes belongs to Congress only as an appropriate means of carrying into execution its limited grant of legislative powers. U. S. Const. Art I, § 8, cl. 18." *Robin v California*, 342 U.S. 165 (1952). However, I agree this Court has the power to determine the constitutionality of statutes that properly fall within our jurisdiction. *United States v Matthews*, 16 M.J. 354 (C.M.A. 1983).

The United States Supreme Court has never interpreted the Constitution to contain a right of privacy to the extent envisioned by Judge Spisak. In *Bowers v Hardwick*, 478 U.S. 186, 197 (1986), the Supreme Court ruled that the Due Process Clause of the Fourteenth Amendment did not confer a fundamental right on homosexuals to engage in consensual sodomy in the privacy of the home. The case involved a challenge to a Georgia statute that criminalized sodomy.[7] Like Article 125, UCMJ, the Georgia statute did not target a particular sexual orientation and consent was not a defense. Although the challenge to the statute involved consensual sodomy between homosexuals and was decided on that narrow issue, the Supreme Court rejected any effort to construct a new constitutional right to private consensual sexual conduct by piecing together their previous rulings involving child rearing,[8] procreation[9] marriage,[10] contraception,[11] and abortion.[12]

> [A]ny claim that these cases nevertheless stand for the proposition that any kind of private sexual

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[7] Georgia Code Ann. § 16-6-2 (1984) provided in pertinent part: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . ."

[8] *Carey v Population Services International*, 431 U.S. 678 (1977); *Pierce v Society of Sisters*, 268 U.S. 510 (1925); *Meyer v Nebraska*, 262 U.S. 390 (1923).

[9] *Skinner v Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[10] *Loving v Virginia*, 388 U.S. 1 (1967).

[11] *Griswold v Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v Baird*, 405 U.S. 438 (1972).

[12] *Roe v Wade*, 410 U.S. 113 (1973).

> conduct --between consenting adults is constitutionally insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far.

Id. at 191. I will not ignore the obvious import of this language but instead will take to heart Justice White's admonition to his own court in *Bowers* when he wrote, "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* at 197. I also find significant the history of sodomy laws that were in effect in the original 13 states when the Bill of Rights was ratified. *Id.* at 192-194.

The United States Court of Appeals for the Armed Forces also has not recognized a right of privacy derived from the Constitution that safeguards consensual marital intimacy. *United States v Scoby*, 5 M.J. 160, 166 (C.M.A. 1978). In *United States v Henderson*, 34 M.J. 174 (C.M.A. 1992), the court held there was no constitutional right of privacy that protected sodomy between consenting individuals.

In *United States v Pritchard*, 45 M.J. 126 (1996), the court affirmed the conviction of Specialist Pritchard, who was infected with the HIV virus, for having unprotected sexual intercourse with his wife in violation of his commander's safe-sex order. The court, in reaching its decision, relied on the appellant's guilty plea to this offense and did not address the constitutional issue of marital privacy raised in the issue they specified when they granted review in the case. In *United States v Bygrave*, 46 M.J. 491 (1997), Boatswain's Mate Second Class Bygrave, who was infected with the HIV virus, challenged his conviction for aggravated assault resulting from unprotected consensual sexual intercourse with a woman who knew he was

infected. He contended that there was a fundamental right under the Constitution to engage in sexual intercourse and that this right could not be abridged absent a compelling governmental interest. While conceding the fundamental right asserted by the appellant did not exist, the court, nevertheless, assumed its existence and found the government had a "sufficiently compelling interest to proscribe unprotected sexual intercourse between HIV-positive servicemembers and uninfected, unmarried, noncivilian partners. . . ." *Id.* at 497.

I agree with Judge Arterton in *Bygrave* that, "[B]etween the poles of *Griswold* and *Bowers*, the constitutional terrain, at least insofar as it has been laid out by the Supreme Court, grows more difficult to navigate." *Id.* at 495. However, the reason the terrain is difficult to navigate in this case is because we are entering into "[t]he sacred precincts of marital bedrooms. . . ." *Griswold*, 381 U.S. at 485.

In *Griswold*, where the Supreme Court held that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the state, Justice Douglas defined marriage as "[a]n association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Id.* at 486. However, at the time the appellant committed these acts of sodomy *per annum*, his marriage did not embody any of those attributes.

The appellant was convicted of assaulting his former wife by grabbing her throat, choking her, and banging her head on the floor. He was also convicted of soliciting her to commit prostitution. According to the appellant's former wife, he told her to prostitute herself because they could use the money she received to pay family bills and that having sex with other men would improve their sexual relationship. She testified that during their marriage prior to the assaults and prostitution, she refused the appellant's requests to engage in this sexual act because she had been forcibly and painfully sodomized while a

teenager. Her revulsion and fear of this sexual act was underscored by her testimony that she refused to allow any of the men who paid to have sex with her to perform this sexual act on her. Obviously, after being assaulted and encouraged to have sex with other men by her husband, she had less bargaining power with him then she had with total strangers. Due to the pain she experienced whenever the appellant performed this sexual act, on one occasion she did allow him to videotape in exchange for his promise to stop subjecting her to this violation. Unfortunately, the appellant did not honor his promise.

The use of temporal police power to punish the appellant for sodomizing his wife does not strike me as anymore an unwarranted violation of the sanctity of this marriage, than the punishment he received for assaulting her or encouraging her to sell herself to help pay the bills. We know he harmed her physically while performing this sexual act because the pain caused her to cry and sometimes scream. I also infer he harmed her emotionally as she was forced to recall the trauma she suffered when she was violated as a teenager.

In my humble opinion, the result here does not offend the Constitution or marriage as an institution. Instead, the appellant's conviction for violating Article 125, UCMJ, is permissible because he violated the marital union by using it to impose his desire on his wife, who but for that marital union would have never allowed her body to be subjected to that invasion. "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." John Stuart Mill, *On Liberty* 201 (1859).

OFFICIAL

s/LAURA L. GREEN
Clerk of Court

Appendix C

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES, Appellee	)	USCA Dkt. No. 99-0788/AF
	)	Crim. App. Dkt. No.
v.	)	32727
	)	
James M. ALLEN (549-19-0533), Appellant	)	ORDER

On consideration of appellee's petition for reconsideration of the opinion of the Court reported at 53 M.J. 402 (2000), it is, by the Court, this, 8th day of November, 2000,

ORDERED:

That said petition is hereby denied.

For the Court,

/s/Thomas F. Granahan
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Counsel for Appellant (HECKER)
Counsel for Appellee (VAUGHT)